

# **WEBINAR WEDNESDAYS**



**Wednesday, April 8, 2020**

## **PRE RULE 11 & RULE 11 ISSUES IN LJ COURTS & HOW MHC CAN HELP**

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Distributed by:

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## Pre-Rule 11 and Rule 11 in Limited Jurisdictions, How Mental Health Courts Can Help

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## History of MHC in Flagstaff City Court

- ▶ Coconino County Criminal Justice Coordinating Committee (CJCC) looks at Specialty Courts, 2000s
  - ▶ Mental Health Court (MHC) – active today
  - ▶ Veteran's Services Court (VSC) – active today
  - ▶ Homeless Court/Serial Inebriant Program – shelved for now, though coming back to forefront (Tucson Model?)
- ▶ Serially inebriated, mentally ill, homeless "tourism" populations rising, straining local courts, PDs, MH providers, EDs, chambers of commerce and everyone else

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## MHC and Pre-Rule 11

- ▶ City of Flagstaff Prosecutor's Office and Municipal Court roll out Mental Health Court in 2004 - Average 20 +/- enrollees at a time
- ▶ Any stakeholder may refer a person to MHC – Officer, JA, Jail, Public Defender, Victim, etc.
- ▶ Many defendants, often times our repeat recidivists, don't have the mental capacity (at least at present) to participate meaningfully in MHC – the point of the Pre Rule 11 meetings/work is to maximize competency outside jail and absent court orders
- ▶ Often seeming knee jerk reaction of public defender is to file Rule 11
- ▶ In most City Courts a R11 filing = dismissal because you can bankrupt a jurisdiction doing even one restoration to competency
  - ▶ Pre R11 screen - \$200-300; Rule 11 eval - \$200/hr or \$450 flat rate
  - ▶ Restoration to competency Yav Co - \$250/day, ASH - \$750/day

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## When & Why to do Pre R11 v. Dismissal

- ▶ Pre Rule 11
  - ▶ Will your city/county pay for it?
  - ▶ Does the offender desire to stay in your jurisdiction (e.g., gets arrested there a lot v. passing thru)
  - ▶ Are the crimes victim crimes?
  - ▶ Have the victims invoked, cooperated, etc.?
  - ▶ Are there private services (aka family funds or a guardian) able to get D treatment?
  - ▶ Is D under COT? Compliant?
- ▶ Dismissal
  - ▶ Jurisdiction won't pay
  - ▶ Victimless case (obstruct thoroughfare, public consumption, certain trespasses, etc.)
  - ▶ Victim won't cooperate (another serial inebriant, S/O of D, passing thru)
  - ▶ D will not comply with previous COT or R11 Orders
  - ▶ Obviously R11, and not restorable
  - ▶ County case (F) and them paying

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## MHC and Pre Rule 11 Processes

- ▶ MHC meets every other Thursday (alternates with Veteran's Services Court) at 1 PM – present are the stakeholders from community
- ▶ Jail Pre Rule 11 meeting takes place in jail every other Thursday as well – Jail Staff, or Attorneys, ID problem inmates w/MH issues
- ▶ ID if on AHCCCS, enrolled w/local RBHA (in Fig is SBHS or TGC) – have they never been served or fallen off of services?
  - ▶ Our providers have apparently realized they can bill the state for these services and are now eager to go into the jail to get people enrolled or reenrolled.
- ▶ Arrange out of custody appt w/provider, med review or LAI, get released directly to provider ASAP – then look at filing R11 or doing MHC or dismissal
  - ▶ Has reduced jail bed days by up to 2/3 for this population saving \$\$\$ and increasing timely, efficient justice for Victim and Offender

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## MHC Process and Pre Rule 11, cont'd

- ▶ The PreR11 jail meeting is a collaborative process with the goals of:
  - ▶ Getting D out of jail and into services to control SMI behaviors;
  - ▶ Reducing recidivism/victimization of community members and family;
  - ▶ Providing justice to the defendant, victim and society;
  - ▶ Increasing the length of time between re-arrests and/or reducing the severity of behaviors leading to arrest;
  - ▶ Reducing costs to jurisdiction for R11 evals, jail bed days, etc.
  - ▶ Reducing PreR11 filings, Rule 11 transfers to Super Court (and that delay)
- ▶ So far the effort has been zero cost and has resulted in tying this persistently criminally involved population to the services to which they're entitled, allowing us to keep track of them, reducing preR11 evals, costs, jail bed days and delay in resolving cases in Super Ct

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## Results of Pre Rule 11 intervention

- ▶ In the 24+ months that we've been doing these we have identified dozens of persistently criminally involved persons in the community that cycle in and out of jail
  - ▶ 38 persons w/10+ arrests, totaling 430+ arrests in 14 mo in Flagstaff
- ▶ Most of those that call Flagstaff home have been previously enrolled in services and have fallen off (got medicated and stable, felt fine, discontinued treatment, back to constant arrests, rinse/repeat)
- ▶ Those that do not call Flag home have regularly been tied into services in Mohave, Yavapai, Maricopa, other j/ds or out of state – or to family members who have lost track of them and want them home (and are willing to come get them or pay to get them home)
- ▶ We're regularly happy to dismiss with a photo of D with today's paper standing next to a "Welcome to New Jersey" sign . . . ☺

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## Results cont'd

- ▶ Those cases that do have a Pre Rule 11 hearing in City court are frequently dismissed at the time of that hearing if possible (given factors noted previously – passing thru, non-V, non-serial, etc.)
- ▶ Those that slip through the cracks or are victim cases or a very persistent D end up with the Rule 11 hearing in Superior Court (can take months to get a hearing date)
  - ▶ I ask the judge there to order the Rule 11 eval sparingly, as needed
  - ▶ I regularly ask the judge to appoint a guardian much to the chagrin of our pub fid ("we can't make them obey the law!" "yes, but you can do the following several things (e.g. housing, med appts, etc.)")
  - ▶ I also will convey to the judge that they have the jurisdiction to dismiss the case pursuant to statute (ARS Sec 13-4501 et seq, ARCRimP R11)
    - ▶ Helps me explain to the V that the mean ol' Judge dismissed not ill' ol' me.

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## Incompetency, Defined Variously - An Eye on Ethics

"Incompetency is the inability to make choices.  
A competent person chooses to run risks; an  
incompetent person simply happens to run them." – Silberfeld & Fish.

"The statistics on sanity are that one out of every four people is  
suffering from a mental illness.

Look at your 3 best friends. If they're ok, then it's you."  
— Rita Mae Brown

"One person's craziness is another person's reality." — Tim Burton

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## Definition Cont'd

- ▶ ARS 14-5101 Definitions –  
"Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.
- ▶ As Ministers of Justice it is incumbent on us that we do not calculate success or failure by convictions or jail days but by whether a just result was achieved.
- ▶ When dealing with persons incapacitated by mental illness, substance abuse or similar, the power disparity is much greater than the average case.

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## The Ethics of Working with a Diminished Capacity Population

- ▶ Special Considerations for Prosecuting this Population
- ▶ ER 3.8: The prosecutor in a criminal case shall:
- ▶ (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
  - ▶ Every participant in MHC has the PD, and they advocate for and usually refer those to the Pre Rule 11 meeting

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## But they're not my "Client"

- ▶ Many ERs in regard to a lawyer's dealing with diminished capacity persons refer to the lawyer's relationship to the "Client" -
- ▶ See e.g., ER 1.2 (Scope of Rep and Allocation of Authority)
  - ▶ ER 1.4(b) – communication to facilitate an "informed decision"
    - ▶ Comment 5 - The client should have *sufficient information to participate intelligently* in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.
  - ▶ ER 1.14(b) – Client Under Disability - consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
  - ▶ Get them a lawyer – the State is your client, but you wear the white hat.

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### ER 4.3

- ▶ *Transactions With Persons Other Than Clients*
- ▶ In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested
  - ▶ "I represent the State of AZ/City of Flagstaff, not you" and clearly and frequently state as such
- ▶ The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel
  - ▶ "I am not your lawyer, and cannot give you legal advice or tell you what you should do to resolve your case – If you can't afford a lawyer you may be eligible for a court appointed lawyer, here's the form"
- ▶ It's easier to deal with lawyers anyway, so I try to get all Dim/Cap Ds lawyers wherever possible

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### FAQs – Pre Rule 11 Meeting

- ▶ Who do you review? This is for those with multiple cases or the one-off clearly mentally ill person who is suffering from mental breakdowns or trauma due to life events or missing medications (or self-medicating) that often get arrested in sprees.
- ▶ Do we see the same person over and over again? Absolutely, I can rattle off the names of my top 10 at the drop of a hat – but we can't jail them forever, the ARS doesn't contain an "exile" provision, and we gotta do something.
- ▶ Serious Mental Illness is a life-changing and on-going trauma that is not going to be fixed by participation in a 6 month long misdemeanor specialty court. Our goal is to reduce recidivism and increase the length of time between law enforcement contacts by tying Ds into services (often repeatedly).
- ▶ Do you need all stakeholders at the table? It is certainly better to have stakeholders, esp. those with power/money at the table – so far we have not been able to get the County Attorney's office involved, though the County Jail, Health District and RBHAs are involved.
- ▶ What's the point? Doing the best we can with what we have.

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### Less Frequently A'd Qs?

- ▶ Questions
- ▶ Discussion
- ▶ Comments
- ▶ Anecdotes\*
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## MHC - Takeaways

- ▶ For those offenders with SMI diagnosis (or displaying behaviors/symptoms that make such a diagnosis likely) will discuss at R11 meeting, try to bring into programs (MHC or VSC depending on eligibility), establish services in community, then determine eligibility and appropriate resolution for case.
- ▶ Fortnightly Pre-Pre-Rule 11 Screenings of Offenders with regular meetings with Jail MH, City Prosecutor, TGC, SBHS, FMC and other stakeholders at the jail (or via Zoom, Microsoft Teams etc.), for those ID'd by jail staff or other stakeholders.
- ▶ Non-adversarial, solutions oriented, jail-bed-day reducing discussion for betterment of D with positive social net benefit to society/victims.

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